82-1513

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ALEXANDER L. STEVAS,
CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1982

ESCAMBIA RIVER ELECTRIC COOPERATIVE, INC.,

Appellant,

v.

FLORIDA PUBLIC SERVICE COMMISSION and GULF POWER COMPANY,

Appellees

JURISDICTIONAL STATEMENT

Henry L. Gray, Jr.
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and William H. Chandler

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March 14, 1983

QUESTIONS PRESENTED

1. May a state determine that a private utility company is entitled to serve a customer within a rural area historically served by a rural electric cooperative, and deny such right to the cooperative, upon the basis of a policy favoring the private utility because of alleged preferential economic advantage given cooperatives by Congress, when such policy has no legitimate, rational state regulatory basis?

2. Does such policy constitute an arbitrary and unreasonable exercise of governmental power, constituting a denial to the cooperative of due process and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution?

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities ii

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions 1

Statement of Case 3

The Question is Substantial 7

Conclusion 10

Appendix

A. Opinion of Supreme Court of Florida A-1

B. Order of Florida Public Service Commission B-1

C. Order Denying Rehearing C-1

D. Remarks of Commissioner Leisner D-1

E. Remarks of Commissioner Gunter E-1

F. Notice of Appeal F-1

TABLE OF AUTHORITIES

CASES

Alabama Power Co. v. *Alabama Electric Cooperative, Inc.*,
394 F.2d 672 (5th Cir.) *reh'g denied* 397 F.2d 809, *cert. denied*
393 U.S. 1000 (1968) 7

Atchison, Topeka, and Santa Fe Ry. Co. v. *Public Utilities Commission of the State of California*,
346 U.S. 346 (1953) 1

Dairyland Power Cooperative,
37 F.P.C. 12, 35 L.W. 2385 7

Gainesville-Alachua County Regional Electric Water and Sewer Utilities Board v. *Clay Electric Cooperative, Inc.*,
340 So.2d 1159 (Fla. 1976) 4

Rural Electrification Administration v. *Central Louisiana Electric Co.*,
354 F.2d 859 (5th Cir.), *cert. denied* 385 U.S. 815, *reh'g denied*
385 U.S. 964 (1966) 9

Salt River Project Agr. Dist. v. *Federal Power Comm.*,
391 F.2d 470, 473 (D.C. Cir. 1968) 7, 9

Tampa Electric Co. v. *Withlacoochee River Elec. Cooperative*,
122 So.2d 471, 473 (Fla. 1960) 8

Zobel v. *Williams*,
457 U.S. _____ (1982) 8

CONSTITUTIONAL PROVISIONS

United States Constitution, Fourteenth Amendment 1

FEDERAL STATUTORY PROVISIONS

28 U.S.C. §1257(2) 1

7 U.S.C. §901, *et seq.* 9

FLORIDA STATUTORY PROVISIONS

§366.04(2)(e) *Fla. Stat.* (1980 Supp.) 2

§366.04(3) *Fla. Stat.* 4

§366.04(3) *Fla. Stat.* (1981) 2, 4, 8

§366.10 *Fla. Stat.* (1981) 5,6

§425.03(1) *Fla. Stat.* (1981) 2

§425.04(4) *Fla. Stat.* (1981) 2

FLORIDA RULES OF APPELLATE PROCEDURE

Fla.R.App.P. 9.030(a)(B)(ii) 5

Fla.R.App.P. 9.040(e) 6

Fla.R.App.P. 9.210(b)(4) 6

OPINIONS BELOW

The Order of the Florida Public Service Commission (App. B) is unreported. The opinion of the Supreme Court of Florida (App. A) is reported at 421 So.2d 1384 (Fla. 1982). The Order Denying Rehearing (App. C) is unreported.

JURISDICTION

Appellant appeals from the decision of the Supreme Court of Florida rendered on September 2, 1982, (App. A), rehearing denied on December 15, 1982, (App. C). Such opinion affirmed the Order of the Florida Public Service Commission involving a territorial dispute between Appellant, a rural electric cooperative, and Appellee, Gulf Power Company, an investor-owned utility, and which determined the issues in favor of Appellee.

A Notice of Appeal to this Court was filed in the Supreme Court of Florida on March 4, 1983, (App. F).

This appeal is being docketed in this Court within ninety days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2) and *Atchison, Topeka, and Santa Fe Ry. Co.* v. *Public Utilities Commission of the State of California*, 346 U.S. 346 (1953).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

§366.042(2) (e), *Fla. Stat.* (1980 Supp.) provides in pertinent part:
"In the exercise of its jurisdiction, the Commission shall have power over rural electric cooperatives...to resolve any territorial dispute involving service areas between and among rural electric cooperatives...and other electric utilities under its jurisdiction. In resolving territorial disputes, the Commission may consider, but not be limited to consideration of, the ability of the utilities to expand services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services."

§366.04(3), *Fla. Stat.*, 1981, provides:
"(3) The Commission shall further have jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities."

§425.03(1), *Fla. Stat.*, 1981, provides:
"Rural area" means any area not included within the boundaries of an incorporated city, town, village, or burrough, having a population in excess of 2,500 persons."

§425.04(4), *Fla. Stat.*, 1981, provides in pertinent part:
"A cooperative shall have power...to...supply electric energy in rural areas..."

STATEMENT OF CASE

1. This case involves the question of whether the Florida Public Service Commission may resolve a territorial dispute between a rural electric cooperative and an investor-owned utility company, by directing that the investor-owned utility company be permitted to extend its service into the geographical area served exclusively by the cooperative for more than 30 years, upon the announced policy that cooperatives enjoy preferential economic advantage, were not set up to take business away from private utilities, and should not compete with investor-owned utility companies.

2. These proceedings commenced on July 6, 1981, when Appellant filed an emergency petition with the Florida Public Service Commission, wherein it sought an order of the Commission to prevent Appellee, Gulf Power Company, from extending its electrical transmission lines into Appellant's service area in order to serve two customers at a single site. Such emergency petition asserted a paramount right to serve the customers who are located in Escambia's exclusive area of service. Two days later, on July 8, 1981, Gulf filed its response, essentially denying that the customers were in Escambia's area of service, and asserting its own paramount right to serve them. Contemporaneous with the filing of its response to the emergency petition, Gulf filed its motion seeking an immediate hearing on or before July 16, 1981. The Florida Public Service Commission acted promptly upon such motion, and scheduled the matter for immediate hearing on July 16, 1981.

3. The dispute arose when the customer, Exxon, U.S.A., requested that Gulf provide electric service to its Blackjack Creek site in rural Santa Rosa County, Florida. The evidence reveals without dispute that Gulf's closest customer was 6.7 miles north of the Exxon site, and which Gulf began serving in 1974, by crossing Escambia's transmission lines. The evidence further showed that Escambia had 1,102 customers within that same 6.7 mile area, and that Escambia actually had a distribution line to the site serving Exxon Pipeline Company since 1974.

§366.04(3), *Fla. Stat.*, 1981, mandates that the Florida Public Service Commission, in exercising its jurisdiction, act in a manner which prevents an uneconomic duplication of electrical distribution and transmission facilities. In fact, in responding to an assertion that §366.04(3), *Fla. Stat.* was an unconstitutional delegation of legislative power, the Florida Supreme Court in *Gainesville-Alachua County Regional Electric Water and Sewer Utilities Board* v. *Clay Electric Cooperative, Inc.*, 340 So.2d 1159 (Fla. 1976), found that such statute was not an unlawful delegation of power, concluding that "the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities," citing §366.04(3), *Fla. Stat.* is the limitation or guideline upon which the Florida Public Service Commission may exercise its jurisdiction, as follows:

> "(3) The Commission shall further have jurisdiction over the planning, development, and maintenance, of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities."

4. Notwithstanding the clear mandate of §366.04(3), *Fla. Stat.* 1981, and the limitation theretofore imposed by the Florida Supreme Court upon the Florida Public Commission in regard to the Commission's exercise of its jurisdiction in *Gainesville, supra,* the Florida Public Service Commission rendered its Order upon an announced policy that rural electric cooperatives were formed to serve rural America and were not set up to take business away from private utilities. At the conclusion of the Administrative Hearing, Commissioner Leisner stated into the record (APP.D.):

> "...So what I come down to, since everything else seems to be equal, is that Gulf Power versus Escambia River, we have an investor owned utility against a cooperative, and that brings me down to the purpose of the cooperative and why it was formed; and going back to

what Mr. Vinson brought out, it is my understanding and always has been that REA's were set up to bring electricity to rural America and they are not set up to take business away from private utilities. And in this case you have a subsidized company trying to complete with an investor owned company, and I have to go with giving the business to the investor owned company. This is a large industrial company; it is not a rural-residential decision. And, therefore, I would move to dismiss the Petition of Escambia River."

Commissioner Gunter, acting as Chairman, supported her motion and, thereupon, stated (APP.E.):

"...the pervasive thing as brought out by Commissioner Leisner was what's really the purpose. We have one area that's one operation which does have favorable financial aspects due to legislation on the federal level, and then you get to the situation of what were they designed for, and it's really a perception on my part as well as response on the part of witnesses, and as Commissioner Leisner's questioning to that witness brought forth, the primary purpose of REA's in this country–and God knows they have done a super job..."

The Supreme Court of Florida affirmed the decision of the Florida Public Service Commission in a four to three decision, in which the Court found that there was substantial, competent evidence to support the findings of fact of the Commission, but in which the Court omitted any reference to the constitutional issues firmly presented, briefed, and argued before it.

5. Such omission by the Court was not due to the failure of Appellant to properly, and in a timely manner, raise the constitutional issue. Such issue arose only at the conclusion of the administrative proceedings when the triers of fact announced into the record their findings and the bases for their ruling (App. C,D). Under Florida law the decision of the Florida Public Service Commission is reviewable by direct appeal to the Supreme Court of Florida. Fla.R.App.P. 9.030(a) (1) (B) (ii); §366.10, *Fla.*

Stat, 1981. Appellate practice in Florida neither requires nor permits assignments of error. Fla.R.App.P. 9.040(e). The issues on appeal were framed in Appellant's Initial Brief. Fla.R.App.P. 9.210(b) (4). Those issues were stated as follows:

POINT I

THE FINDINGS OF FACT OF THE PSC ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AND DO NOT COMPORT WITH REASON AND LOGIC.

POINT II

THE ANNOUNCED POLICY BASIS UPON WHICH PSC RENDERED ITS DECISION AMOUNTS TO AN ARBITRARY AND OPPRESSIVE EXERCISE OF GOVERNMENTAL POWER, IS CONTRARY TO THE ANNOUNCED POLICY OF THE PSC, IS CONFISCATORY OF APPELLANT'S RIGHTS, IS A DENIAL OF DUE PROCESS OF LAW, AND DENIES APPELLANT ITS RIGHT TO EQUAL PROTECTION OF THE LAW, AS GUARANTEED BY SECTIONS 2 AND 9 OF ARTICLE I OF THE CONSTITUTION OF THE STATE OF FLORIDA, AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

6. The consitutional issues presented to this Court were raised by the brief and argument of Appellant in the Supreme Court of Florida.

The decision of the Florida Public Service Commission, as approved by the Supreme Court of Florida, is based upon a factor totally unrelated to the State's legitimate objectives in the resolution of territorial disputes. The decision from which this appeal is taken is expressly grounded upon the fact that Appellant is a rural electric cooperative; that cooperatives receive low-interest loans from the federal government; and the intent of Congress in enacting the Rural Electrification Act in 1936 was to bring electricity to rural areas of America not otherwise receiving electric service. Such grounds are wholly unrelated to the legitimate statutory objectives of the State of Florida in resolving territorial disputes, and their use by the Commission in arriving at its decision is clearly erroneous. The effect is to relegate rural electric cooperatives to second class citizenship when competing for customers with investor-owned utilities, thereby denying cooperatives equal protection of the law.

THE QUESTION IS SUBSTANTIAL

Rural electric cooperatives are something more than public utilities competing with privately owned power companies. They are instrumentalities of the United States. In *Alabama Power Co.* v. *Alabama Electric Cooperative, Inc.*, 394 F.2nd 672, 677 (5th Cir.) *reh'g denied* 397 F.2d 809, *cert. denied* 393 U.S. 1000 (1968). the Court stated:

> "The Power Company would treat REA simply as a rival public utility. We agree with the recent decision of the Federal Power Commission in *Dairyland Power Cooperative*, 37 F.P.C. 12, 35 L.W. 2385, that rural electric cooperatives are something more than public utilities; they are instrumentalities of the United States. 'They were chosen by Congress for the purpose of bringing abundant, low cost electric energy to rural America.' See also, *Salt River Project Agr. Dist.* v. *Federal Power Comm.*, D.C.Cir. 1968, 391 F.2d 470."

However, the Supreme Court of Florida has ruled that a rural electric cooperative may not compete on an equal basis with other utilities, making it, then, a second class citizen. The State of Florida does recognize that a utility company is possessed of property or property rights in its customers and that an extension of service by one utility in contravention of the rights of another is tantamount to an unlawful injury or hindrance to such property rights. *Tampa Electric Co.* v. *Withlacoochee River Elec. Cooperative,* 122 So.2d 471, 473 (Fla. 1960).

Obviously, then, the opinion of the Supreme Court of Florida in affirming the Florida Public Service Commission has deprived Escambia of its property rights without due process of law, and has denied Escambia the equal protection of the law, both as guaranteed by the Fourteenth Amendment to the United States Constitution. Such decision will, thereupon, cause irreparable harm to all rural electric cooperaives in Florida.

The grounds enunciated by the Florida Public Service Commission, and affirmed by the Supreme Court of Florida, bear no rational relationship to the legitimate interest of the State of Florida in maintaining a power supply system within the State which will sufficiently provide for the needs of its citizens without unnecessary duplication of facilities. §366.04(3) *Fla. Stat.,* 1981. Viewed in such light, the decision is arbitrary, oppressive, and constitutionally impermissable. Cf. *Zobel* v. *Williams,* 457 U.S. _____ (1982). The nature of the business of cooperatives is such that the overall costs to individual customers are reduced when the cooperatives render service to new customers, and especially large ones. By permitting a competing utility company to invade an area which has been served exclusively for more than 30 years by a cooperative, the State of Florida has doomed the customers of the cooperative by burdening them with the inevitability of higher and higher rates, instead of a reduction of rates as normal growth would permit.

The fact that cooperatives receive low interest loans from the United States government should have been completely irrelevant to the issues in the territorial dispute. The Rural Electrifica-

tion Administration was established by Congress in 1936, in order to bring low cost electricity to rural areas. *Salt River Project Agr. Dist.* v. *Federal Power Comm.*, 391 F.2d 470, 473 (D.C. Cir. 1968). The Rural Electrification Administration was empowered by Congress to make low interest loans in order to attain the stated objective of the act. 7 U.S.C. §901 *et. seq.*

The inquiry of this Court must, therefore, be made as to whether the fact of such loans has any proper, reasonable, or rational connection with the State's objective in providing for a coordinated power supply for the State of Florida. Although Florida has now ruled that cooperatives should not compete with investor-owned utilities, in rural areas, the federal courts have determined that economic competition between rural electric cooperatives and other utilities should be encouraged, not prevented. *Rural Electrification Administration* v. *Central Louisiana Electric Co.*, 354 F.2d 859 (5th Cir.), *cert. denied* 385 U.S. 815, *reh'g denied* 385 U.S. 964 (1966). The congressionally authorized low interest loans to cooperatives are wholly unrelated to the legitimate statutory objectives of the State of Florida, and were improperly considered by the Florida Public Service Commission and the Supreme Court of Florida.

CONCLUSION

Probable jurisdiction should be noted in this case in view of the apparent constitutional violations, conflict with existing federal case law and the substantial nature of the issue involved.

Respectfully submitted,

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ESCAMBIA RIVER ELECTRIC
COOPERATIVE, INC.,
Appellant,

v.

FLORIDA PUBLIC SERVICE COMMISSION,
and GULF POWER COMPANY,
Appellees.

No. 61-679

Opinion of Supreme Court of Florida

September 2, 1982

ALDERMAN, C.J.

Escambia River Electric Cooperative, Inc., seeks review of an order of the Public Service Commission resolving a territorial dispute in favor of Gulf Power Company, We affirm.

Escambia River filed a petition with the Commission under authority of section 366.04(2) (e), Florida Statutes (1980 Supp.), seeking resolution of a territorial dispute between it and Gulf Power Company. At the conclusion of a public hearing, the Commission found that both Escambia River and Gulf Power had the generating capacity, transmission facilities, and reliability to provide the requested 115 kv service, that both companies had customers in and around the disputed area, that there would be no duplication of transmission facilities because neither company had 115 kv lines in the area, and that the cost of providing the requested service would be approximately the same for the two companies.

The Commission then ruled in favor of Gulf Power declaring that it was entitled to provide power to the Exxon Blackjack Creek Miscible Gas Displacement Project and that Escambia

River was prohibited from serving the Project. In support of its ruling, the Commission stated:

> The facts in this dispute fail to demonstrate any significant advantage possessed by Gulf or Escambia with respect to capacity to provide the electrical power requirements requested by Exxon. The Commission is basically confronted in this case with a policy decision as to whether a privately owned utility or a rural electric cooperative should serve requirements of this nature when no factual or equitable distinction exists in favor of either party. The Commission concludes that the dispute must be resolved in favor of Gulf Power Company.
>
> We feel that our decision comports with the policy delineated in *Tampa Electric Co.* v. *Withlacoochee River Coop.*, 122 So.2d 471 (Fla. 1960). In that case, the "preferential economic advantage" enjoyed by rural electric cooperatives, such as Escambia, and the "fundamental underlying purposes which motivated the establishment of the rural electrification program" were enunciated as grounds for enjoining Withlacoochee from providing electrical service in competition with Tampa Electric Company, a private utility.
>
> The plain language as well as the spirit of Section 425.04, Florida Statutes, was additionally cited as a statutory prohibition against such competition. The Florida Supreme Court further observed in *Withlacoochee* as follows:
>
> > It is a matter of common knowledge that the real purpose to be served in the creation of REA was to provide electricity to those rural areas which were not being served by any privately or governmentally owned public utility. It was not intended that REA should be a competitor in those areas in which as a matter of fact electricity is available by application to an existing public utility holding a

franchise for the purpose of selling and serving electricity in a described territory.

While we recognize the valuable service performed by the cooperatives, we believe that this case, too, presents an example of the type of electrical requirements that is beyond the basic intent and purpose of the cooperatives, especially when a privately owned utility can reasonably meet those requirements.

We find, contrary to the arguments made by Escambia River, that the record contains competent substantial evidence to support the Commission's findings of fact. We also find that when, as in the present case, no factual or equitable distinction exists in favor of either utility, *Tampa Electric Co.* v. *Withlacooche River Electric Cooperative, Inc.*, 122 So.2d 471 (Fla. 1960), controls, and the territorial dispute is properly resolved in favor of the privately owned utility. We therefore agree with the Commission's conclusion of law concerning the application of *Withlacoochee* to the factual situation in the present case, and we affirm its order resolving the territorial dispute in favor of Gulf Power.

We disagree, however, with the Commission's alternative finding that its more extensive jurisdiction over privately owned utilities is an additional consideration supportive of a policy decision in favor of Gulf Power. We disapprove the jurisdictional distinction as a valid reason to support a ruling for a privately owned utility and against a rural electric cooperative in a territorial dispute.

Accordingly, we affirm the decision of the Public Service Commission.

It is so ordered.

BOYD, SUNDBERG and McDONALD, JJ., Concur
ADKINS, OVERTON and EHRLICH, JJ., Dissent

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Public Service Commission

Henry L. Gray, Jr. of Chandler, O'Neal, Gray, Lang and Haswell, Gainesville, Florida,

for Appellant

William S. Bilenky, General Counsel and Kathleen Villacorta, Associate General Counsel, Tallahassee, Florida, for Florida Public Service Commission; and C. Roger Vinson of Beggs and Lane, Pensacola, Florida, for Gulf Power Company,

Appellees

George C. Douglas, Jr., Andalusia, Alabama,

for Alabama Electric Cooperative, Inc., Amicus Curiae

APPENDIX B

ORDER OF FLORIDA PUBLIC
SERVICE COMMISSION

DOCKET NO. 810265-EU
ORDER NO. 10171
ISSUED: 7/31/81

In re: An Emergency Petition of Escambia River Electric Cooperative, Inc., Against Gulf Power Company.

The following Commissioners participated in the disposition of this matter:

GERALD L. GUNTER
SUSAN W. LEISNER

Pursuant to notice, the Florida Public Service Commission held public hearing on the above matter in Tallahassee, Florida on July 16, 1981.

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ORDER

BY THE COMMISSION:

On July 6, 1981, Escambia River Electric Cooperative filed a petition seeking resolution of a territorial dispute between the cooperative and Gulf Power Company. The petition alleged an emergency condition requiring an immediate hearing. In its response, Gulf Power Company agreed that the matter should be given expedited consideration. Pursuant to agreement of the parties, a public hearing was conducted in Tallahassee on July 16, 1981.

The petition was filed under authority of Section 366.04 (2) (e), Florida Statutes. The Commission is empowered under that Section as follows:

> (e) To resolve any territorial dispute involving service areas between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction. In resolving territorial disputes, the commission *may consider,* but not be limited to consideration of, the ability of the utilities to expand their

services within their own capabilities and the nature of the area involved, including population, the degree of urbanization of the area, its proximity to other urban areas, and the present and reasonably foreseeable future requirements of the area for other utility services. (emphasis added)

FINDINGS OF FACT

Evidence adduced by Gulf and Escambia substantiated the necessity for an immediate hearing in that Exxon Company, U.S.A., a division of Exxon Corporation has requested Gulf Power Company to provide service to its Blackjack Creek Miscible Gas Displacement project by October 1, 1981. Exxon requires temporary service with an initial load of 1075 kw to be served from a 46/4.16 kv substation. Permanent service with an initial load of 1665 kw to be provided subsequently from a 115/12.47 kv substation is required to commence on January 1, 1983.

Also included in the dispute is a request for service to Air Products and Chemicals, Inc., which requires a portion of the total electrical power demand at the Blackjack site, situated, lying, and being in Section 23 Township 4 North, Range 29 West, approximately two and one half (2½) miles South of the Community of Cobbtown, Santa Rosa County, Florida. Air products power requirements involve permanent service having an initial load of 2430 kw to be served from a 115/12.47 kv substation. Although both Exxon and Air Products and Chemicals require 115/12.47 kv service, the timing of Air Product's requirements establish the inservice date for the permanent facilities as August 1, 1982.

Both Escambia and Gulf have the present capability, from the stand point of generating capacity, adequacy of transmission facilities, and reliability, to serve the requested load. The requisite 115 kv transmission line needed to provide service to the site would require construction by Gulf of approximately six (6) miles of transmission facilities, while Escambia would need ap-

proximately three and one half (3½) miles of additional line. Gulf's line would be initially constructed to provide 115 kv service. Escambia, on the other hand, proposes to construct a temporary one and one half (1½) mile 46 kv transmission line, to serve the initial load and would thereafter build a three and one half (3½) mile line to meet the requested permanent 115 kv load in late 1982.

Gulf estimated construction of its proposed 115 kv transmission line would be $1,057,000. Escambia originally alleged that construction of its proposed permanent and temporary transmission lines would cost approximately $1,100,000, but at the hearing, estimated that construction of the permanent 115 kv line would be $650,000 and that the temporary 46 kv line would cost approximately $70,000. The discrepancy was not resolved.

Escambia would have to obtain its right-of-way, but Exxon has agreed to permit Gulf's construction of the 115 kv line along an oil-pipe ine route it presently owns. At the hearing, Escambia presented no evidence as to the costs associated with the right-of-way it would have to purchase, nor with the removal of the temporary 46 kv line once its 115 kv line is placed in service.

Presently, neither Gulf nor Escambia has any transmission line of 115 kv capacity in the Blackjack Creek area in which Exxon and Air Products have requested service. Thus, the construction of a line by either will not result in a duplication of transmission facilities in the area.

The disputed area is a rural area as defined under Section 425.03, Florida Statutes,"...any area not included within the boundaries of any incorporated or unincorporated city, town, village, or borough having a population in excess of 2,500 persons...". Escambia presently serves approximately 6,200 customers in its general service area, an increase from an estimated 5,800 customers in 1970. The general area is relatively stable economically, and its population is not projected to grow significantly or become "urbanized" in the immediate future.

The majority of Escambia's 1,102 customers served in the disputed area are residential in character, with some small commerical operations or other small loads. Escambia has only one large load customer, which is Brad High School. Gulf has one large customer in the immediate area, "Exxon 5," from which it proposes to extend the 115 kv transmission line to Blackjack Creek. Escambia had been requested to serve "Exxon 5," but could not provide the loop feed requested at that time. The power requirements at the Blackjack Creek facility will be 6 megawatts, a load sufficient to serve a small town. The rates quoted by Gulf and Escambia to serve the load were substantially the same.

CONCLUSIONS OF LAW

The facts in this dispute fail to demonstrate any significant advantage possessed by Gulf or Escambia with respect to capacity to provide the electrical power requirements requested by Exxon. The Commission is basically confronted in this case with a policy decision as to whether a privately owned utility or a rural electric cooperative should serve requirements of this nature when no factual or equitable distinction exists in favor of either party. The Commission concludes that the dispute must be resolved in favor of Gulf Power Company.

We feel that our decision comports with the policy delineated in *Tampa Electric Co.* v. *Withlacoochee River Coop.*, 122 So 2d 471, (Fla. 1960). In that case, the "preferential economic advantage" enjoyed by rural electric cooperatives, such as Escambia, and the "fundamental underlying purposes which motivated the establishment of the rural electrification program" were enunciated as grounds for enjoining Withlacoochee from providing electrical service in competition with Tampa Electric Company, a private utility.

The plain language as well as the spirit of Section 425.04, Florida Statutes, was additionally cited as a statutory prohibition

against such competition. The Florida Supreme Court further observed in Withlacoochee as follows:

> It is a matter of Common knowledge that the real purpose to be served in the creation of REA was to provide electricity to those rural areas which were not being served by any privately or governmentally owned public utility. It was not intended that REA should be a competitor in those areas in which as a matter of fact electricity is available by application to an existing public utility holding a franchise for the purpose of selling and serving electricity in a described territory.

While we recognize the valuable service performed by the cooperatives, we believe that this case, too, presents an example of the type of electrical requirements that is beyond the basic intent and purpose of the cooperatives, especially when a privately owned utility can reasonably meet those requirements.

Moreover, this Commission has comprehensive jurisdiction over investor-owned utilities such as Gulf respecting"...fair and reasonable rates and charges, classifications, standards of quality and measurements, and service rules and regulations...", Section 366.05 (1), Florida Statutes. We do not have similar jurisdiction over rural electric cooperatives. We believe that the determination of rates through public, adversarial Commission hearings, subject to review by courts of competent jurisdiction, creates an environment amicable to industrial development and find this to be an additional consideration supportive of a policy decision in favor of Gulf Power Company. Accordingly, it is

ORDERED by the Florida Public Service Commission that Gulf Power Company be and is hereby entitled to provide electric power to the Exxon Blackjack Creek Miscible Gas Displacement Project. It is further

ORDERED that Escambia River Electric Cooperative is hereby prohibited from serving said Project.

By ORDER of the Florida Public Service Commission, this 31st day of July 1981.

(SEAL)

/s/ Steve Tribble
COMMISSION CLERK

ARS

APPENDIX C

ORDER OF THE SUPREME COURT OF FLORIDA DENYING REHEARING

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, DECEMBER 15, 1982

ESCAMBIA RIVER ELECTRIC COOPERATIVE, INC.,
Appellant,

vs.

FLORIDA PUBLIC SERVICE COMMISSION and
GULF POWER COMPANY,
Appellees.

CASE NO. 61,679

On consideration of the motion for rehearing filed by attorneys for appellant, and replies thereto,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

ALDERMAN, C.J., BOYD and McDONALD, JJ., Concur
OVERTON, J., Concurs specially: I vote to deny rehearing because, although I disagree with the majority opinion there is nothing new in the petition for rehearing and the resignation of a member of this court is not grounds for rehearing.
ADKINS and EHRLICH, JJ., Dissent

A True Copy

TEST:

/s/ Sid J. White
Clerk Supreme Court

C

cc: Henry L. Gray, Jr., Esquire
of Chandler, O'Neal, Gray,
Lang & Haswell
Kathleen Villacorta, Esquire
C. Roger Vinson, Esquire
of Beggs & Lane
George C. Douglas, Jr., Esquire

APPENDIX D

EXCERPT FROM ORAL FINDINGS OF FACT AND CONCLUSIONS OF LAW BY COMMISSIONER LEISNER ENUNCIATED INTO THE RECORD AT THE CONCLUSION OF THE ADMINISTRATIVE HEARING APPEARING AT PAGES 263-264 OF THE TRANSCRIPT

"COMMISSIONER LEISNER: Well, as I can see the issues outlined by both of you, there are several things that we're considering. The first one is territorial, and, as I view the evidence in this case, there really isn't any clearly drawn boundary in this case. Both companies have customers in and around this area.

Second of all, we talked about the duplication. It seems to me neither company is currently serving Exxon; there's no duplication of service here; both would have to build. Since no one is serving Exxon, then there's no displacement in this case either. The cost to both companies seems to be approximately equal. So what I come down to, since everything else seems to be equal, is that Gulf Power versus Escambia River, we have an investor owned utility against a cooperative, and that brings me down to the purpose of the cooperative and why it was formed; and going back to what Mr. Venson brought out, it is my understanding and always has been that the REA's were set up to bring electricity to rural America and they are not set up to take business away from private utilities. And in this case you have a subsidized company trying to compete with an investor owned company, and I have to go with giving the business to the investor owned company. This is a large industrial company; it is not a rural-residential decision. And, therefore, I would move to dismiss the Petition of Escambia River."

APPENDIX E

EXCERPT FROM ORAL FINDINGS OF FACT AND CONCLUSIONS OF LAW BY COMMISSIONER GUNTER ENUNCIATED INTO THE RECORD AT THE CONCLUSION OF THE ADMINISTRATIVE HEARING APPEARING AT PAGES 264-267 OF THE TRANSCRIPT

"CHAIRMAN GUNTER: Commissioner, I support your motion and I want to give a couple of reasons why, and mine parallel yours very closely, but there's some others. I listened very carefully and evaluated the issues, and I made my little list a little differently than you did. I looked at the issue of waste, whether there's going to be a waste in construction—and that's my terminology—as to whether it would be more expensive for one than the other, and we talked about the difference of three-and-a-half to six-plus miles. And then I got to the questioning of—hold it just a second. I want to make sure this is correct. The questions of Mr. Oerting. It was going to be one line constructed, and do it on the front-end, and then the mileage differences begin to disappear when he started adding in the mile-and-a-half temporary line plus the additional mileage for the permanent line. That became kind of a wash; rates became kind of a wash. The customer relationship, which was obvious, and we could refer to the exhibits, exhibits and testimony, of where negotiations had started approximately a year ago, and that the customer in the selection of their supplier by testimony had cooperated to the point that this was a working agreement, working arrangement on right-of-way, easing easements which had existed with property owner's permission that showed to me a very favorable customer-supplier relationship, which I understand courts have said were not the sole reason for awarding of territory.

Both discussed benefits to the customers by base load. I think that's a wash because neither group of customers should be

favored over the other, but the pervasive thing as brought out by Commissioner Leisner was what's really the purpose. We have one area that's one operation which does have favorable financial aspects due to legislation on the federal level, and then you get to the situation of what were they designed for, and it's really a perception on my part as well as response on the part of witnesses, and as Commissioner Leisner's questioning to that witness brought forth, the primary purpose of REA's in this country—and God knows they have done a super job. I'm probably the only person sitting in this room that REA brought me out of the dark ages, out here by service by Talquin Electric in Liberty County, so I certainly appreciate what they have done and what there're doing for rural America, but as far as the industrialization, the overall maintenance of the—I don't know the word I'm quite looking for—the maintenance of trying to attract industrial customers to this part of the world and to all of Florida and the surety of being in an environment where rates can be controlled by due process, through review bodies and on to courts for proper jurisdictions if there are mistakes made, I think just has to lead me to deny the Petition and tell them to get that service to the customer. So the decision of the Commission is unanimous."

APPENDIX F

NOTICE OF APPEAL

IN THE SUPREME COURT OF FLORIDA

NO. 61,679

FILED
MAR. 4 1983
SID J. WHITE
CLERK SUPREME COURT
BY _____
CHIEF DEPUTY CLERK

ESCAMBIA RIVER ELECTRIC COOPERATIVE, INC.,
Appellant,

vs.

FLORIDA PUBLIC SERVICE COMMISSION
and GULF POWER COMPANY,
Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that ESCAMBIA RIVER ELECTRIC COOPERATIVE, INC., the appellant named above, hereby appeals to the Supreme Court of the United States from the decree of the Supreme Court of Florida entered September 2, 1982, rehearing denied December 15, 1982, affirming the Order of the FLORIDA PUBLIC SERVICE COMMISSION entered July 31, 1981, Docket No. 810265-EU, Order No. 10171.

(This appeal is taken pursuant to 28 U.S.C. §1257(2)).

Henry L. Gray, Jr.
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Attorneys for Appellant

CERTIFICATE OF SERVICE OF NOTICE OF APPEAL

I Henry L. Gray, Jr., a member in good standing of the Bar of the Supreme Court of the United States and of the Supreme Court of Florida, certify that all parties required to be served with a copy of the foregoing Notice of Appeal pursuant to U.S. Supreme Court Rules 10 and 28, 28 U.S.C., have been provided with such by depositing a true copy thereof in the United States post office at Gainesville, Florida, main branch, first-class postage prepaid, to C. Roger Vinson, Esquire, P. O. Box 12950, Pensacola, Florida 32576 and Kathleen Villacorta, Esquire, Associate General Counsel, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32301 and The Honorable Steve Tribble, Clerk of the Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32301 on March 2, 1983.

Henry L. Gray, Jr.